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In The Supreme Court of the United States

LONNIE C. CHRISTENSEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

I. With the teachings of **Stirone v. United States**, 361 U.S. 212, 218, 4 L.Ed.2d 252, 80 S.Ct. 270 (1960), **Neder v. United States**, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), and later in **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), establishing that elements of the offense need to be specifically set forth in the Indictment, did the district court of Nevada, and Ninth Circuit Court of Appeals violate Petitioner's due process rights through failing to address Petitioner's claims surrounding the "defective indictment/lack of jurisdiction" claim.

LIST OF ALL PARTIES

The following is a list of all parties to the proceeding in the Court of Appeals for the Ninth Circuit:

1. **CHRISTENSEN,** Lonnie C.
   Defendant/Appellant/Petitioner

2. **UNITED STATES OF AMERICA**
   Plaintiff/Appellee/Respondent

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In The
Supreme Court of the United States

LONNIE C. CHRISTENSEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Christensen requests that a *writ of certiorari* issue to review the denial of his §2255 motion, as well as the denials of a Certificate of Appealability by both the district court and the Ninth Circuit Court of Appeals.

OPINION BELOW

As to the denial of Petitioner's Title 28 U.S.C. §2255 motion in the United States District Court, there are no reports or opinions other than (i) the district court's denial of Petitioner's motion; (ii) the district court's denial of the request for Certificate of Appealability; and (iii) the Ninth Circuit Court of Appeals' denial of the Certificate of Appealability - all of which can be found in the Appendix,

beginning at App. 1. However, Petitioner did have his direct appeal denied by the Ninth Circuit in **United States v. Christensen**, ___ F.3d ___, 1999 U.S. App. LEXIS 144 (9th Cir. 97-10485, January 4, 1999) (unpublished), *petition for rehearing denied*, ___ F.3d ___, 1999 U.S. App. LEXIS 3025 (9th Cir. February 22, 1999).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Given the Judgment of the United States Court of Appeals for the Ninth Circuit, on the request for a Certificate of Appealability, dated and entered on January 18, 2002, the jurisdiction of this Honorable Court is invoked under Title 28 U.S.C. §1254(1).

The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

CONSTITUTIONAL PROVISIONS INVOLVED

The requirement that an indictment contain all of the elements of the offense provides a defendant with notice and protection from double jeopardy. **United States Constitution - Amendment V** ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb). A defendant may be correctly charged by the Grand Jury in order to be on adequate notice of the charges against him and upon what elements of the offense he must defend against as is protected by t he Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On April 25, 1997, Petitioner, Lonnie Christensen, was found guilty of Count 1 - *Conspiracy to Commit the Offense of Fraud* against the United States; Counts 2-5, 7 and 9 - a violation of 26 U.S.C. 7206(1) - *Filing a False Statement on a Tax Return;* Count 11 - *Obstructing Internal Revenue Laws* in violation of Title 26 U.S.C. 7212(a); Counts 12 and 13 - *Obstruction of Justice* in violation of Title 18 U.S.C. 1512(b)(2)(A) and (b)(1); and Count 14 - *Mail Fraud* in violation of Title 18 U.S.C. 1341. Of the aforementioned charges, Counts 1-5, 7, 9, 11 and 14 resulted in a 3 to 5 year statutory maximum sentencing range. Counts 12 and 13 allow for a statutory maximum sentence of 10 years of imprisonment.

The presentence report established a sentencing guideline range for the first group of closely related counts to the conspiracy (Counts 1, 5, 7, 9 and 11-13) of 28. The second group [Counts 1, 11 and 14] resulted in a guideline range of 25. (See Presentence Report, ¶50-63). This multiple group count adjustment resulted in a total sentencing range of Level 30. With a Criminal History Score of I, the guideline range, for sentencing purposes, was 97 to 120 months barring any other enhancements or departures.

Sentencing in this matter took place on November 4, 1997. Counts 12 and 13 were the only two counts which afford the court an opportunity to give a sentence greater than the statutory maximums [3 to 5 years] of the other offenses. Counts 12 and 13 allow for a 10 year maximum sentence to be imposed. As such, and after hearing arguments as to the relevant sentencing factors, the district court imposed a total term of incarceration of 110 months upon Petitioner.

Petitioner filed a timely Notice of Appeal and, subsequently, submitted appellate arguments to the Ninth Circuit court of Appeals, as to the conviction and sentence.

Said appeal was denied by the Ninth Circuit, in an unpublished opinion, on January 4, 1999. See **United States v. Christensen**, 1999 U.S. App. LEXIS 144 (9th Cir. Jan. 4, 1999). Petitioner's request for a rehearing was also denied. *See* **United States v. Christensen**, 1999 U.S. App. LEXIS 3025 (9th Cir. Feb. 22, 1999).

Petitioner subsequently filed a motion under 28 U.S.C. §2255 in the United States District Court on February 17, 1999. Said motion set forth two claims for which relief was requested, to wit: (i) the conviction was in violation of the Fourth Amendment; and (ii) the conviction was a result of prosecutorial misconduct. Through an Addendum, a third issue involving a jurisdictional issue, in relation to *Apprendi, infra*, was added.

The district court denied an evidentiary hearing and, through an Order dated December 21, 2000, the district court denied relief to Petitioner on the issues presented.

A timely Notice of Appeal was filed February 14, 2001, simultaneously with Petitioner's Application for Certificate of Appealability. In the Application for said Certificate, Petitioner raised the following issues: (i) Whether the District Court erred in finding that a codefendant's attorney held the attorney/client privilege resulting in a violation of petitioner's due process rights; (ii) Whether the District Court erred by not granting an evidentiary hearing to make a determination of the truth of the matter asserted as it relates to prosecutorial misconduct in releasing exculpatory codefendant information that affected the due process rights of the defendant; and (iii) Whether the District Court erred by failing to address

Petitioner's indictment and jurisdictional claims. On February 26, 2001, the district court denied Petitioner's appellate request.

Petitioner then submitted an Application for Certificate of Appealability, raising the same issues, with the Ninth Circuit Court of Appeals. The Ninth Circuit denied Petitioner's request in an Order dated February 26, 2002.

REASONS FOR ALLOWANCE OF THE WRIT

I. THIS PETITION FOR *WRIT OF CERTIORARI* SHOULD BE GRANTED BECAUSE THE DISTRICT COURT, AS WELL AS THE NINTH CIRCUIT COURT OF APPEALS, FAILED TO ADDRESS PETITIONER'S INDICTMENT AND JURISDICTIONAL CLAIMS WHICH ARE IN DIRECT CONFLICT WITH OTHER CIRCUITS AND SUPREME COURT PRECEDENT.

This court should decide on whether the case of **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), merely set forth a directive that had previously been decided by the Supreme Court and simply reinforced the precedent that an indictment must set forth all of the elements of the offense in order to avoid a defective indictment and to validate the grand jury's accurate assessment of the charges, putting the defendant on notice of said charges for purposes of being able to defend themselves against the specific elements of the offense.

Argument

The petitioner's accepted addendum to the 2255 set forth the principle that if an indictment is flawed, as to all of the elements of the offense, by not incorporating those elements of the offense in the charges presented, then such would not establish jurisdiction in which to prosecute the defendant on the indictment as a whole, or at the very least, the charges for which the defect exists. *Apprendi v. New Jersey* is merely a post-cursory reinforcement of pre-existing case law on the requirement of all of the elements of the offense being presented within the indictment.

A brief synopsis of the *Apprendi* claim must be addressed in order to understand that **THIS IS NOT AN *APPRENDI* CLAIM BEING PRESENTED TO THE SUPREME COURT FOR ANALYSIS.**

Apprendi v. New Jersey set forth the following: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." *Apprendi* at 2362-63. What *Apprendi* said was something that had already been said before, only this time was being more forceful as it related to the sentencing structure or the outcome of a sentence that was greater than the statutory maximum if a particular element of an offense was not incorporated in an indictment which created the increased sentence. As a result of *Apprendi*, such elements must be incorporated in the indictment in order for a jury to make a finding specific to those elements and to convict the defendant of a crime that would increase the statute. Without going into the specific details of *Apprendi*, the general tenor of the case resulted in a reduced sentence on the offender for which the court had initiated a greater offense sentence than the statutory maximum without the particular elements incorporated within the indictment structure that would have increased the sentence given. What *Apprendi* was also saying was that the jurisdictional flaws within the

indictment resulted in the defendant not being allowed to be sentenced to a greater term of imprisonment than the statutory maximum. What *Apprendi* did not resolve was whether or not such elements not being incorporated in an indictment created a jurisdictional flaw that falls within the well-established precedent that such flaws create a defective indictment as a whole. This is a critical distinction, and also a reminder of a serious problem within the resulting effects of *Apprendi*.

If an element of the offense is NOT in the indictment, and a sentence cannot exceed a statutory maximum of what particular charge was presented, then the indictment has an inherent defect, irrespective of the sentence to be imposed. A statute must contain all of the elements of the offense in order to be properly charged and put a defendant on notice of those charges.

Such questions create serious issues of jurisdiction. This court has granted a Petition for Certiorari in the case of **United States v. Cotton**, 261 F.3d 397 (4th Cir. 2001), Supreme Court No. 01-687. In *Cotton*, the Fourth Circuit found that "the district court exceeded its jurisdiction in sentencing the defendants for a crime with which they were never charged, thus depriving them of the constitutional right to 'answer' only for those crimes presented to the grand jury." *Cotton, supra.* More specifically, the Fourth Circuit stated:

> "Thus, because an indictment setting forth all the essential elements of an offense is both mandatory and jurisdictional, and a defendant cannot be held to answer for any offense not charged in an indictment returned by a grand jury, a court is without jurisdiction to impose a sentence for an offense not charged in the indictment. To hold otherwise would be to allow the court to impermissibly broaden the indictment on its own accord during the sentencing phase. To be sure, the district court action in this case did not technically result in a constructive

> amendment of the indictment...[b]ut there is no question that the effect of what it did was the same, because the court sentenced the appellants for a crime with which they were never charged...In so doing, the district court encroached upon the prerogative of the grand jury, because only the grand jury has the power to broaden the charges after an indictment has been returned." *Id.*

Wherefore, this Honorable Court should hold the decision in Christensen pending the outcome of *Cotton* as it has an effect on the question presented in Christensen. Christensen avers that without specific elements being presented in the indictment on one or all of the charges, the defective counts themselves, at a minimum, must be removed from the indictment as jurisdictionally flawed. This Honorable Court must decide with such flaws in the indictment, does that affect the entire indictment and does jurisdiction require the indictment be overturned in its entirety or, at the very least, those counts that are defective must be overturned. A defendant can only be sentenced to those counts which are accurate and reflective of the statute, which, in turn, put the defendant on notice of not only the charges against him, but the elements of which he must defend against.

The Grand Jury

As set out in Petitioner's accepted addendum to the §2255 motion, the holding in **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), had a direct impact on Petitioner's jurisdictional issue and, thereby, bolstered Petitioner's argument that the sentences and convictions, as to Counts 12 and 13, should be vacated for lack of proper jurisdiction. With *Apprendi* further defining what constituted elements of an offense, along with the long-standing case law surrounding indictments, and what they must set forth to establish an offense, Petitioner argued

that the defects as to Counts 12 and 13 created a lack of jurisdiction for the district court to impose both the judgment and sentence in relation to said Counts. As the Sentencing Guidelines applied to the defective charges significantly increased the punishment for the non-defective charges, Petitioner submits that he should not have been sentenced to a term of imprisonment over five (5) years at the very least.

The District Court failed to address Petitioner's jurisdictional claim, as it affected the Indictment and the statutory maximums applicable to Petitioner's circumstances. More importantly, the court was clearly erroneous in not recognizing that Petitioner's claims were jurisdictional in nature. Likewise, in denying the Certificate of Appealability, the Ninth Circuit also failed to address the jurisdictional claims. Petitioner's claim was not based on *Apprendi*.

Petitioner respectfully asserts that there exists jurisdictional defects in the charging of Counts 12 and 13, and that there was a sentence imposed in violation of the Constitution and laws of the United States. As such, relief to Petitioner is warranted.

The Grand Jury Clause of the United States Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. The court said that: "to comport with the Fifth and Sixth Amendments, a criminal indictment must (1) contain all of the elements of the offense so as to fairly inform the defendant of the charges against him, and (2) enable the defendant to plead double jeopardy in defense of future prosecutions for the same offense." **United States v. Santeramo**, 45 F.3d 622, 624 (2nd Cir. 1995) (*per curiam*).

The requirement that an indictment contain all of the elements of the offense provides a defendant with notice and protection from double jeopardy. See Const. Amend. V ("nor shall any person be subject for the same offense to be

twice put in jeopardy of life or limb); Const. Amend. VI ("the accused shall enjoy the right...to be informed of the nature and cause of the accusation"). An indictment also "limits the defendant's jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." **Stirone v. United States**, 361 U.S. 212, 218, 4 L.Ed.2d 252, 80 S.Ct. 270 (1960).

The notion that an indictment is a prerequisite to jurisdiction over a criminal case in the federal courts is long established. In **Ex parte Bain**, 121 U.S. 1, 30 L.Ed. 849, 7 S.Ct. 781 (1887), the Supreme Court first stated its "opinion that an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged." 121 U.S. at 12-13. For this proposition, "the *Bain* case ... has never been disapproved ...." *Stirone*, 361 U.S. at 218.

The framers of the United States Constitution intended the grand jury to stand between the prosecutor and the ordinary citizens; it was regarded as the primary security against hasty, malicious and oppressive persecution. **Wood v. Georgia**, 370 U.S. 375, 390 (1962). The Fifth Amendments requirement that no person be held to answer for a "infamous" crime unless charged by a grand jury established a body independent from the courts and prosecutors to scrutinize evidence against a potential defendant. *See* **United States v. Callandra**, 414 U.S. 338, 343 (1974) (stating that grand jury functions include the determination of probable cause and protection of citizens against unfounded criminal prosecutions). *See also* **United States v. Dionisio**, 410 U.S. 1, 17 (1973) (intended to serve as if "protective bull work standing silently between the ordinary citizen and an overzealous prosecutor).

The Grand Jury is charged with presenting the indictment. The Fifth Amendment requires that a defendant be convicted only on charges considered by the Grand Jury. *See* **United States v. DuBo**, 186 F.3d 1177, 1179 (9th Cir. 1999) (holding that indictment's failure to specify *mens rea*

necessary for Hobbs Act conviction required dismissal. This requirement ensures the defendant is prosecuted only "on the basis of the facts presented to the Grand Jury..."). *Id. citing* **United States v. Rosi**, 27 F.3d 409, 414 (9th Cir. 1994). Refusing to reverse a conviction based on such an indictment would impermissibly allow a conviction on a charge never considered by the Grand Jury. *See DuBo* at 1180 (*citing* **Stirone v. United States**, 361 U.S. 212, 219 (1960)). Therefore, failure to include the *mens rea* element of the crime in the indictment "renders the indictment constitutionally defective"). *Id.* The complete failure to charge an essential element of a crime, however, is, by no means, a mere technicality. *See DuBo* at 1180, *citing* **United States v. King**, 587 F.2d 956, 963 (9th Cir. 1978). The omission of the *mens rea* from an indictment "on its face is deficient" and "not amenable to harmless error review." *DuBo* at 1179, *accord in* **United States v. Prentiss**, 206 F.3d 960 (10th Cir. 2000) (holding that an indictment failing to specify elements is a fundamental defect that is not subject to harmless error review, even if challenged after the verdict).

Christensen's Indictment [Count 12]

Starting with Count Twelve, the statute, 18 U.S.C. 1512(b)(2)(A), requires that:

> "Whosoever knowingly uses intimidation or physical force, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to
>
> (a) withhold testimony, or withhold a record, document or other object, from an official proceeding... [emphasis added]
>
> shall be fined under this Title or imprisoned not more than 10 years or both."

As set forth in the above-cited case law, the specific language of the statute must be pled in the indictment. Petitioner's Indictment, in regard to Count 12, reads as follows:

> "On or about September 9th and 13th, 1993, and continuously up to and including December, 1994, within the District of Nevada, the defendant...with the intent to cause and induce Chris Wilcox, CPA, and the accounting firm of Bradshaw & Smith, to withhold a document from an official proceeding, did corruptly engage in misleading conduct towards Chris Wilcox by purloining original work papers of Chris Wilcox after gaining access to Chris Wilcox's office by abusing a position of trust placed in Christensen as a client of Wilcox, and then refusing to return to Wilcox his work papers, even after formal request and service of a grand jury subpoena in December, 1994 for this original work papers."

Count 12 does not track statutory language. The conduct perpetrated against the CPA is not conduct perpetrated against an official proceeding or a witness, victim or informant as required by 18 U.S.C. 1512. Failure to return the papers that Christensen had taken was not a result of an official proceeding with Wilcox. The Fifth Amendment right of Christensen to not incriminate himself protects him from having to provide such information to the Grand Jury.

The language of 1512 requires even more specific statements as to what the "official proceeding" was that resulted in the withholding of "testimony, record, document or object." (See 1512(b)(2)(A) as charged in Count 12). Pursuant to 18 U.S.C. 1512(f)(1), an "official proceeding" has been said to be "a proceeding before a judge, court,

magistrate, grand jury or government agency before a judge or court of the United States, United States Magistrate, or Bankruptcy Judge, a Federal Grand Jury, or a Federal Government Agency, or under 1512(f)(2), the judge is a judge of the United States or that the law enforcement officer is an employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an advisor or consultant". None of these features of the statute were pled in Count 12 or apply to the conduct referenced in Count 12. Mr. Wilcox was/is not a member of the court, the government, nor was he representing the government. He was representing Petitioner in a private capacity. The government describes the withholding of the document from an official proceeding as conduct perpetrated against Mr. Wilcox. The word "official proceeding", as seen in Petitioner's indictment is, at the best, ambiguous.[1] This policy embodies *"the instinctive distaste against men languishing in prison unless a lawmaker has clearly said they should."* Where there is ambiguity in a criminal statute, or in a criminal penalty as is defined by the Federal Sentencing Guidelines that are formulated through statutes doubt should be resolved in favor of the defendant.

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[1] Where an indictment is ambiguous, the rule of lenity requires the interpretation of same to benefit the defendant.

The question of lenity has been defined more specifically. See **United States v. Bass**, 404 U.S. 336, 30 L.Ed.2d 488, 92 S.Ct. 515, *(ambiguity concerning the ambient of criminal statutes should be resolved in favor of lenity);* **Rewis v. United States**, 401 U.S. 808, 812, 91 S.Ct. 1056 (1971), *(When choices have to be made between two readings of what conduct the Congress had made in crime, it is appropriate, before we choose a harsher alternative, to require that Congress should have spoken in language that was clear and definite);* **United States v. Universal C.I.T. Credit Corp.**, 344 U.S. 218, 221-222, 73 S.Ct. 227 (1952) *(a fair wording should be given to the world on language the common world would understand of what the language intended to do if a certain line is passed. To make the wording fair so far as possible, the line should be clear....because of the seriousness of the criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures, not courts, should define criminal activity.)*

By failing to track the statute, the jury was left with the impression that the relationship of Mr. Wilcox and Petitioner was an official proceeding. Refusing to return Mr. Wilcox's work papers, even after a formal request from the Grand Jury, is not the withholding of testimony, records or documents, from an official proceeding, defined or inferred by the statute.

Christensen's Indictment [Count 13]

As to Count 13, Title 18 U.S.C. 1512(b)(1) states, in pertinent part:

> "Whosoever knowingly uses intimidation or physical force, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to influence, delay or prevent testimony of any person in an official proceeding... [emphasis added]
>
> shall be fined under this Title or imprisoned not more than 10 years or both."

The specific language of a statute must be pled in the indictment. As with Count 12, Petitioner asserts that Count 13, possesses deficiencies that cannot be overcome without vacating Petitioner's conviction on Count 13. The government, in this Count, charged Petitioner as follows:

> "In or about February 1994, within the District of Nevada, the defendant, LONNIE C. CHRISTENSEN, with intent to influence the testimony of Steven S. Miller in an official proceeding, did corruptly engage in misleading conduct toward Steven S. Miller, to misrepresent relevant information in an official proceeding, including a taxpayer conference concerning CHRISTENSEN's conduct at the United States department of Justice, by abusing his position

> of trust as a business partner and friend of Steven S. Miller by securing Miller's signature on a letter prepared by CHRISTENSEN falsely stating that Miller borrowed funds from CHRISTENSEN and repaid them with three separate checks drawn on a business account and made payable to M.J. WOOD, when in fact these payments were for services rendered by M.J. Wood, which testimony related to CHRISTENSEN's failure to report his diversion of these payments from M.J. WOOD as income on his tax return."

It is asserted that this charging language in Count 13 has the same deficiencies as referenced in Count 12, above. In Count 13, the government charged a violation of Title 18 U.S.C. 1512(b)(1) which requires a specific type of conduct that prevents testimony of another person in an official proceeding. Nothing in Count 13 describes what specific conduct influenced Miller to prevent him from testifying. A taxpayer conference is not defined as an "official proceeding". Nothing in the language of Counts 12 or 13 identifies how Petitioner influenced a person's testimony, delayed same or prevented it. The statutory language of 1512 is fact-specific. Said facts do not appear in the indictment.

Also missing from these two counts is the required language of knowingly using intimidation, physical force, threats or corruptly persuading another person, or attempting to do so, or engaging in misleading conduct toward that person. The term "knowingly" is critical to the charge and statutory language. The term "knowingly" does not appear in the indictment as to Counts 12 and 13. The indictment is deficient on its face and the jury could not have made an appropriate determination of knowingly perpetrating the conduct in an attempt to commit a criminal offense defined in 1512(b)(2)(A) and (b)(1). There exists a defective indictment.

It is clear that without the term "knowingly" and official proceedings being incorporated in the indictment, both the *mens rea* and the subject matter of the knowing conduct [the determination of the official proceeding] resulted in a defect so substantial as to void those counts of the indictment if not the indictment itself.

Other circuits have made similar findings as that which has been evident in the Supreme Court and the requirement of the Grand Jury.

In **Neder v. United States**, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), and **United States v. DuBo**, 186 F.3d 1177 (9th Cir. 1999), the Supreme Court, and the Ninth Circuit, determined that the Indictment must plead to specific statutory language in each of the charges filed against the defendant. As such, there is specific language in each statute that must be identified to put a defendant on proper notice of what constitutes the charge of the grand jury.

"To be sufficient, an indictment must allege each material element of the offense; if it does not, it fails to charge that offense". **United States v. Deisch**, 20 F.3d 139 (5th Cir. 1994). "A failure of the indictment to charge an offense may be treated as a jurisdictional defect, ... and an appellate court must notice such a flaw even if the issue was raised neither in the district court nor on appeal." **United States v. Foley**, 73 F.3d 484, 488 (2nd Cir. 1996) (internal quotes and citations omitted). As such, the failure of the indictment to charge each and every essential element of an offense is a serious constitutional violation, *see* **United States v. Cabrera-Terran**, 168 F.3d 141, 143 (5th Cir. 1999), which is by no means a mere technicality. *See* **United States v. Brown**, 995 F.2d 1493 (10th Cir. 1993) ("failure of the indictment to allege all the essential elements of an offense ... is a jurisdictional defect requiring dismissal ... The absence of prejudice to the defendant does not cure what is necessarily a substantive, jurisdictional defect in the indictment"); **United States v. Gayle**, 967 F.2d 483 (11th Cir.

1992) ("A criminal conviction will not be upheld if the indictment upon which it is based does not set forth the essential elements of the offense"). Nor is such a failure amenable to harmless error review. *See* **United States v. Spruill**, 118 F.3d 221, 227 (4th Cir. 1997).

As to the ability to challenge the court's jurisdiction, due to defects in the indictment, Rule 12(b)(2) of the Federal Rules of Criminal Procedure sets forth that objections going towards the Indictment failing "to show jurisdiction in the court or to charge an offense ... shall be noticed by the court at any time during the pendency of the proceedings" (emphasis supplied). Following the above rule, it has been said that when indictment fails to sufficiently state an offense, it is a fundamental defect, and such can be raised at any time. *See* **United States v. Spinner**, 180 F.3d 514, 516 (3rd Cir. 1999). *See* **United States v. Glick**, 142 F.3d 520 (6th Cir. 1998) (elements lacking in the indictment are jurisdictional defects which may be raised on appeal despite the failure to preserve the issue for appeal by objection); **United States v. Ramirez-Gamez**, 171 F.3d 236, 239 (5th Cir. 1999) (same).

Applying the above-referenced case law to the case at bar, Petitioner has asserted that his Indictment was so deficient, through the lack of essential elements being charged in Counts 12 and 13, that the district court lacked jurisdiction to try and/or sentence Petitioner as to said Counts. In Counts 12 and 13, which alleged violations of 18 U.S.C. 1512(b)(2)(A) and (b)(1) respectively, the statutory language is significant as it affects the Petitioner's convictions in terms of the jurisdictional concerns, as well as the recent interpretations of *Apprendi, supra*, in regard to the jurisdictional question.

Given the above, the failure to properly allege the essential elements of the offenses charged in Counts 12 and 13 created jurisdictional defects eliminating the ability to prosecute on charges that are not properly presented to the Grand Jury. If an element of the offense is not charged in

the indictment, a jury could not make specific findings on the charges without knowing what the essential elements are as it relates to the evidence presented in the government's case-in-chief. For example, without the specific term "knowing" incorporated in the charged offenses of Counts 12 and 13, the jury's findings would be incorrect.

In Petitioner's case, the jury did not have an accurate statutory interpretation of Counts 12 and 13, precluding the opportunity to find, beyond a reasonable doubt, all factors relevant to Petitioner's charges. In turn, and based on the improper convictions, Petitioner was exposed to a greater sentencing maximum than was legally applicable. Therefore, the sentencing scheme associated with the inclusion of the maximums, and guideline enhancements, applicable to Counts 12 and 13, violated Petitioner's due process rights by allowing a sentence greater than the statutory maximum allowed by law for the non-deficient Counts. Therefore, Petitioner is entitled to relief from his conviction and sentence.

Both the district court and the Ninth Circuit merely denied Petitioner's "indictment / jurisdiction" issue without evaluating his claims on the merits and in compliance with Supreme Court precedent. Since jurisdiction can be brought at any time, the District Court erred in failing to address Petitioner's defective indictment as a jurisdictional issue. Petitioner's case falls squarely within the constitutional question of whether he was adequately charged with a crime at the time the indictment was handed down. Petitioner should not be held in custody beyond the statutory maximum for the non-defective charges without the determination of a jury as to the specific elements of Counts 12 and 13 Petitioner has shown that elements of the offenses charged in Counts 12 and 13 were not sufficiently set forth in the indictment, nor properly decided by the jury.

It is well established that if a court which renders an indictment has not jurisdiction to render it, the judgment is void and may be collaterally attacked via habeas corpus. *See* **In Re: Nielsen**, 131 U.S. 176, 9 S.Ct. 672 (1989). The question does not turn on the jury issue, but on whether or not the lack of information in the indictment establishes a Grand Jury flaw which in time creates a jurisdictional flaw in the indictment, rendering an indictment defective and, therefore, lacking jurisdiction in which to prosecute the defendant on those defective charges on the whole indictment.

Based on the aforementioned facts, and contrary to the district court's finding, Counts 12 and 13 clearly failed to set forth all of the essential elements of the offenses charged. Given the absence of these elements, Counts 12 and 13 each created a jurisdictional defect. With the district court lacking jurisdiction to try, convict, and/or sentence Petitioner as to said Counts, Petitioner's due process rights were violated.

The *Cotton* Case

In **United States v. Cotton**, 261 F.3d 397 (4th Cir. 2001), Supreme Court No. 01-687, the court exceeded its jurisdiction in sentencing appellants under 21 U.S.C. 841(b)(1)(A), a crime for which they were not charged or convicted, thus depriving them of the constitutional right to answer only for those crimes presented to the grand jury and seriously affecting the fairness, integrity, or public reputation of judicial proceedings.

In this case, the government indicted the appellants for a violation of section 841 based upon "a mixture or substance containing a detectable amount of cocaine base, commonly known as 'crack.'" [J.A. 86]. Yet the district court, in turn, sentenced seven of the appellants to a term of imprisonment greater than twenty years, the maximum penalty provided for a violation of section 841(b)(1)(C)

based upon "an identifiable but unspecified quantity" of cocaine base, **United States v. Promise**, 255 F.3d 150 (4th Cir. 2001). Consequently, by sentencing the appellants to a term of imprisonment greater than that provided for in section 841(b)(1)(C), the appellants received a sentence for a crime -- an aggravated drug trafficking offense under section 841(b)(1)(A) -- with which they were neither charged nor convicted.

In *Cotton*, the court said that:

> "A district court cannot impose a sentence for a crime over which it does not even have jurisdiction to try a defendant. Indeed, the Supreme Court explained in *Apprendi v. New Jersey* that the 'indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted,' 530 U.S. at 490 n.15 (emphasis added) (quoting **United States v. Reese**, 92 U.S. 214, 232-33, 23 L. Ed. 563 (1875)), because 'the judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury,' 530 U.S. at 483 n.10. Thus, because an indictment setting forth all the essential elements of an offense is both mandatory and jurisdictional, and a "defendant cannot be 'held to answer' for any offense not charged in an indictment returned by a grand jury," **United States v. Tran**, 234 F.3d 798, 808 (2nd Cir. 2000), a court is without "jurisdiction to . . . impose a sentence for an offense not charged in the indictment," Id. (emphasis added); Id. ("[A] prosecutor cannot make [a] jurisdictional end run, and then urge the court to sentence the defendant for an offense for which the defendant was neither charged nor convicted.")."

"To hold otherwise would be to allow the court to impermissibly broaden the indictment on its own accord during the sentencing phase. To be sure, the district court's actions in this case did not technically result in a constructive amendment of the indictment as the court did not broaden "the possible bases for conviction beyond those presented by the grand jury." **United States v. Floresca**, 38 F.3d 706, 710 (1994) (en banc) (emphasis added). But there is no question that "the effect of what it did was the same," *Stirone*, 361 U.S. at 217, because the district court sentenced the appellants for a crime with which they were never charged. *See Promise, 2001 WL 732389*, at *32 (Motz, J., joined by Widener, Michael, King, JJ., concurring in part and dissenting in part and dissenting in part, and dissenting in the judgment) ("Although the government presented the grand jury with an indictment containing only the elements necessary to charge [the defendant] with a violation of §841(b)(1)(C), the district court sentenced him to the more serious crime defined in §841(b)(1)(A); the court did not formally amend the indictment, but its sentence had the same effect"). In doing so, the district court encroached upon the prerogative of the grand jury, because only the grand jury has the power to broaden the charges "after an indictment has been returned." *Stirone*, 361 U.S. at 215-16."

"Accordingly, the district court exceeded its jurisdiction in sentencing the appellants for a crime with which they were never charged, thus depriving them of the constitutional right to "answer" only for those crimes presented to the grand jury." *See Cotton*.

CONCLUSION

Petitioner, through the above arguments, has set forth meritorious claims surrounding the deprivation of constitutional rights. Such deprivations have resulted in a lack of confidence in the outcome of the jury verdict and a significantly harsher sentence.

Based on the defective language of Counts 12 and 13 in Petitioner's indictment, the government lacked jurisdiction to proceed on those charges. Counts 12 and 13 do not track critical statutory language affecting jury deliberations. A defective indictment results in the dismissal of those charges. Failure of an indictment to sufficiently state an offense is a fundamental defect (affecting jurisdiction).

The claimed defects in Petitioner's Indictment create a lack of adequate jurisdiction and notice to Petitioner as to the charges filed against him. The defective indictment affected the jury's ability to make determinations on the actual charges and what conduct and mind set is made criminal. These defects also deprive Petitioner from being placed on notice of what conduct and constituted criminal behavior, or properly be charged by the Grand Jury. Petitioner's overall sentencing scheme was used to create a sentence above the statutory maximum available under the counts of conviction that are not subject to defective indictment or jurisdictional question [Counts 1-5, 7, 9, 11 and 14]. The maximum penalty against petitioner would have been a five year term of imprisonment but for the indictment errors of Counts 12 and 13. The court, therefore, lacked jurisdiction to sentencing the petitioner above 5 years in prison due to the factual defects in the language of the indictment as to Counts 12 and 13. As such, Petitioner's convictions must be vacated. The Ninth Circuit has failed to follow precedent and is in conflict with other circuits and the Supreme Court.

WHEREFORE, this Honorable Court should grant certiorari or hold the decision pending the outcome of the *Cotton* case.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,
Plaintiff,

v. CR-S-95-074-LDG (LRL)

LONNIE C. CHRISTENSEN, et al.,
Defendants.

ORDER
[Entered December 20, 2000]

This matter comes before the court on defendant Christensen's motion to vacate sentence (#448, response #483, addendum #509 and #510, opposition #511, reply #513, response #515). Christensen claims a violation of his Fourth and Fifth Amendment rights in that Sue Adams, a government witness and former employee of Christensen's, purloined documents from Christensen pursuant to a cooperation agreement with the government. Christensen further alleges that sentencing enhancements imposed by the court run afoul of the doctrine of Apprendi v. New Jersey, 530 U.S. 466 (2000).

At an evidentiary hearing before Magistrate Judge Leavitt, Christensen's counsel accused Adams of seizing, at the government's urging, documents from Christensen's business and giving them to the government without judicial supervision. However, the government denied that any such activity had occurred. At the time of the hearing, Adams was represented by attorney Michael Amador.

In support of his motion, Christensen submits the affidavit of his trial counsel. Christensen's counsel asserts that after the evidentiary hearing, he spoke with Amador "on the basis of strict-confidentiality" since Amador was concerned that the attorney-client privilege was being implicated. From this conversation, counsel represents that

he believes that Adams did in fact acquire documents from Christensen's business with government acquiescence. Counsel claims, however, that he was precluded from advancing this position because of the confidentiality agreement he had with Amador.

In his affidavit, counsel further represents that upon conversing with Amador at a later time, Amador stated that while he did not believe the crime-fraud exception to the attorney- client privilege existed, he would testify before this court if so ordered. Counsel states that he believes Amador's testimony would reveal government misconduct to such a degree that Christensen's conviction should be reversed. The government responds that while Christensen knew of alleged improprieties, he abandoned this claim during the pretrial, trial and direct appeal stages of the litigation. The government further argues that Christensen has not identified what specific documents were purloined, and whether such documents were ever provided to the government by way of subpoena.

A defendant bears the burden of establishing facts entitling him to a hearing on a § 2255 relief. See United States v. McMullen, 98F.3d 1155, 1158 (9th Cir. 1996), cert. denied, 520 U.S. 1269 (1997). In this case, Christensen argues that Amador is privy to privileged information which he will only divulge upon order of the court. However, neither Christensen, nor according to his counsel's affidavit, Amador, has claimed that the privileged communication between Adams and Amador falls within the crime-fraud, or any other exception. See NRS 49.115. Instead, Christensen seems to suggest that Amador's apparent willingness to reveal the communication under order of the court simply changes the privileged nature of the communication. The court does not agree.

Moreover, there is no evidence that Adams, the individual who may claim the privilege, has waived it. See NRS 49.105. Indeed, the court is very troubled by the claim that Amador divulged possible privileged and confidential

information to a third party under some personal confidentiality agreement. However, even if Amador has failed to protect privileged or confidential information by disclosing it to a third party, such would not constitute a waiver of the privilege, unless on Adam's behalf.

Finally, because Christensen was not sentenced to over the statutory maximum for the offenses alleged in the indictment, his motion does not implicate Apprendi. See United States v. Egge, 223 F.3d 1128, 1131 n.1 (9th Cir. 2000). Accordingly,

IT IS HEREBY ORDERED that defendant Christensen's motion to vacate
sentence (#448) is DENIED.

DATED this 20th day of December, 2000.

/s/ L.D. George
Lloyd D. George
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,
Plaintiff,

v. CR-S-95-074-LDG (LRL)

LONNIE C. CHRISTENSEN,
Defendant.

ORDER
[Entered February 26, 2001]

This matter comes before the court on defendant Lonnie Christensen's application for certificate of appealability (#518). As the court concluded in its previous order (#516), Christensen has not met his burden of establishing facts entitling him to a hearing on § 2255 relief. Christensen's motion for §2255 relief indicated that attorney Amador considered Adams' communications confidential and would disclose them only by order of the court. Barring evidence of Adam's willingness to waive any such confidentiality, or the application of an exception-neither of which was argued in the §2255 motion-Christensen has not made a substantial showing of the denial of a constitutional right. Nor has Christensen suffered a substantial denial of a constitutional right as a result of the rejection of his Apprendi argument. Accordingly,

IT IS HEREBY ORDERED that the application for a certificate of appealability (#518) is DENIED as to all issues.

DATED this 26 day of February, 2001.

/s/ L.D. George
Lloyd D. George
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-15612
DC# CR-95-00074-LDG
District of Nevada
(Las Vegas)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FILED
JAN 18 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

LONNIE C. CHRISTENSEN,
Defendant-Appellant.

ORDER
[Entered January 18, 2002]

Before: KLEINFELD and HAWKINS, Circuit Judges.

The request for a certificate of appealability id denied. *See* 28 U.S.C. § 2253(c)(2). All outstanding motions are denied.